No. 84-785

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Office-Supreme Court, U.S.
FILED
DEC 5 1984
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CLERK

IN THE

Supreme Court of the United States

October Term, 1984

JOSEPH FERLITO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Whether petitioner has raised issues involving a substantial federal question requiring plenary consideration by this court.

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The decision of the Supreme Court of the State of New York, Appellate Division, Second Department, is attached to Petitioner's Application herein. Application for leave to appeal to the Court of Appeals of the State of New York was denied on September 7, 1984, as reprinted in Petitioner's Appendix at 1a-2a.

Statement of the Case

Petitioner and Ralph Perrotta, a co-defendant, were charged with acting in concert in the commission of Arson in the Third Degree [N.Y.P.L. §150.10], a class "C" felony, in the burning of a commercial establishment, known as the Miramar Realty Building owned by the petitioner and his brother, Angelo Ferlito. This building was owned by them as a result of a contract of sale in July 1978, and which provided in part, that in case of default all previous payments made on the sale would be considered rent. At the time of the fire on January 23, 1981, petitioner was in default on his payments for the sale of the building in the amount of $52,000 and the fire insurance which was paid by petitioner and recently increased, named petitioner and Lasco, the seller, as the insureds. Prior to trial, Ralph Perrotta, the co-defendant was severed due to a dental illness.*

The fire was first spotted by a police patrol who notified the Fire Department. Fire Chief Gorgone noted that the fire was intense and spreading rapidly and suspected arson, thus arson detectives responded. Police Officer Bartels responded to the fire scene and took up a traffic control post and while there, a civilian Joseph LaFranchi approached him and related that he (LaFranchi) had seen who did it and gave a description of a black blazer with Michigan Plate # HGP-937.** Mr. LaFranchi indicated that while stopped for a traffic light, he saw an explosion, then a fire at the building and saw a dark colored blazer leave the

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* Mr. Perrotta was subsequently tried and convicted on May 27, 1982 in Supreme Court, Suffolk County.

** This plate number came back to Mr. Angelo Ferlito, petitioner's brother.

parking area and followed it. He followed the vehicle until he could get the plate number and saw it pull in front of a house on Saltaire Drive in Copiague, Long Island, N.Y.

The police found the vehicle described by Mr. LaFranchi parked in front of 46 Saltaire Drive, the petitioner's home and saw broken glass on the vehicle, blood on the steering wheel and a trail of blood leading up into the house. Petitioner's friend, Sal Bono, let the police into the house using his key, to see if anyone was injured and they saw blood on the kitchen floor and phone.

Synonomous with the activities occurring at the fire scene and on Saltaire Drive, petitioner was assisted into the emergency room of Brunswick Hospital where he told hospital personnel that he observed kids behind the building, chased them and then "the building blew up on me." Hospital personnel noted that petitioner had a strong odor of gasoline on him which he explained was from working on his oil burner. Detectives Keating and Guilfoyl of the Suffolk County Police, Arson Squad, responded to the scene, surveyed the building and concluded that a vapor explosion from the use of a flammable liquid caused the fire, and then responded to Brunswick Hospital.

After speaking with the police officers there, they directed that petitioner and Perrotta, who admitted he was with petitioner, be placed under arrest. Petitioner's clothes were seized at the precinct and later lab analysis confirmed gasoline was present on petitioner's shoes.

The vehicle parked in front of petitioner's home was secured by police and impounded and a search warrant was

obtained based upon the information of Mr. LaFranchi. Sergeant Dodd Amrhein conducted a search of the vehicle on the morning of the 24th at the police garage pursuant to the search warrant. Upon a search of the interior, a portion of the carpet and a metal gas cap was seized and found to contain gasoline.

The defense case revolved around a claim by petitioner that he saw some unknown kids behind his building and when he went back there and chased them, the building blew up.* Petitioner also adduced contrary proof that the police entered the blazer while it was located at petitioner's home prior to securing a search warrant. The hearing court found the police entered the blazer outside of petitioner's home (since the prosecution contended otherwise, no proof was offered justifying a search) without probable cause but in light of the fact that a search warrant was obtained untainted by any information from the initial search of the blazer and the rug and gas cap was seized the next morning pursuant to a valid search, the doctrine of "inevitable discovery" would preclude suppression of this evidence.

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* It should be noted that during the pre-trial hearings, petitioner identified one of the kids behind the building as Alan Richards, a police informant, at a time when Richards, a potential prosecution witness, was a complainant against petitioner for Criminal Solicitation (suborning perjury). The substance of those allegations stated that petitioner wanted Richards to tell the police he was behind the building on the night of the fire or petitioner would charge him with burglary. Subsequently at the trial, Richards became a defense witness, claiming the police pressured him to make the statements about petitioner suborning perjury, and petitioner then claimed he was mistaken when he identified Richards at the pre-trial hearing as one of the kids behind the building on the night of the fire. Richards was subsequently indicted for and plead quilty to two (2) counts of Perjury and sentenced to six (6) months incarceration and five (5) years probation as a result of his testimony at the trial.

The jury found petitioner guilty of Arson in the Third Degree and on March 25, 1982 petitioner was sentenced to an indeterminate term of imprisonment of two and one-half (2 ½) to seven (7) years.

POINT I

Petitioner has raised no issue involving a substantial federal question requiring plenary consideration by this Court.

While the writ of certiorari is discretionary with this Court, the petitioner has failed to set forth any of the applicable standards contained in 28 U.S.C. 1257 or Supreme Court Rule 17 warranting plenary consideration by this Court. Petitioner's claims are not of sufficient general importance requiring consideration by this Court, and in the absense of raising in the State Courts a strong suggestion of an abuse of discretion by the trial court of constitutional dimensions or an indication of a Federal Constitutional claim, this Court is justified in declining to entertain it. *Illinois* v. *Gates,* 103 S.Ct. 2309, 2321-2322 (1983); *Webb* v. *Webb,* 101 S.Ct. 1889, 1892 (1981); United States Supreme Court Rules, Rule 17 (b)(c).

Petitioner's allegations of error involving issues of severance, adjournments, and recusal of the prosecutrix were addressed to the sound discretion of the trial court and these issues of an abuse of discretion were litigated in the State Appellate Courts and found to be without merit. These issues are not of sufficient general importance as to warrant consideration by this Court. Futhermore, these issues raised in the instant petition now claiming violations

of a constitutional dimension were initially raised and resolved in the New York State Courts as State Constitutional issues and not Federal Constitutional issues. As this Court stated in *Webb.* v. *Webb.* supra, 1982:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a State Court can arise only if the record as a whole shows either expressly or by clear implication that the Federal claim was adequately presented in the State system." (citations omitted).

Petitioner's claims now advanced in this Court as Federal Constitutional claims were not raised nor addressed on those grounds, and thus were not adequately presented in the State system.

Petitioner's claim that the severance of the co-defendant, Perrotta, denied him a fair trial in that he was denied the right to call a necessary witness in his defense is equally without merit. The caselaw is clear that severance is a question directed to the sound discretion of the trial court [N.Y.C.P.L. §200.40(1)] and required where a defendant wishes to call his co-defendant to testify on his behalf. *People* v. *Kampshoff*, 53 A.D.2d 325 (1976) cert. den. 97 S.Ct. 2979; *People* v. *Bornholdt*, 33 N.Y.2d 75, 87 (1973). The trial was conducted from January 13, 1982 until February 10, 1982 and on February 5, 1982 Perrotta was subpenaed to court. While Perrotta was unavailable on that day as a witness due to oral surgery done previously, when it was suggested by the court and the prosecutrix that he return on another day in the event petitioner wished him to testify, petitioner's attorney refused claiming "I wanted to call him (Perrotta) in the order I wanted to call him to present my case."

Petitioner's other claims all revolve around his unsuccessful attempt to further delay the commencement of the trial. At the conclusion of the pre-trial hearings, which lasted four (4) weeks in early November, the trial court and both sides agreed on a definite trial date in January, 1982.

At the commencement of trial, petitioner first claimed that due to a pre-existing back problem dating back five (5) years, his attorney could not withstand the additional travel of fourty miles when the case was relocated to the County Seat in Riverhead, N.Y. for trial. When the court suggested new counsel if this be the case, petitioner's attorney claimed "an individual is entitled to counsel of his own choice" and refused to accede to the Court's suggestion of an adjournment for new counsel.

Upon denying that application, petitioner then advanced that a necessary witness, his mother, was unavailable due to health problems and when that was denied, the issue of the untranscribed minutes of the pre-trial hearings was raised as a basis for an adjournment. The trial court in denying this request followed state caselaw holding that the denial of an adjournment to procure minutes of a pre-trial hearing is untimely when not made until the commencement of trial. *People* v. *Sanders*, 31 N.Y.2d 463 (1973); *People* v. *Peacock*, 31 N.Y.2d 907 (1972); *People* v. *Wilson*, 42 A.D.2d 722 (2nd Dep't 1973). Since Petitioner failed to request or order a transcript of the pre-trial minutes until the commencement of his trial, his demand was untimely.

Finally, petitioner attempts to overcome the failure to raise a federal question by drawing a parallel between the *Rosario* doctrine [*People* v. *Rosario*, 9 N.Y.2d 286 (1961)]

and Title 18 U.S.C. §3500 [Jencks material]. The issue of the pre-trial minutes were raised only in the context of a state right under the *Rosario* doctrine and properly found not to apply in this case. *People* v. *Zanotti*, 30 N.Y.2d 926 (1972).

Petitioner's final claim raises the issue of the trial court's finding of "inevitable discovery" in denying petitioner's pre-trial motion to suppress the seizure of the gas cap and a portion of the rug from within the black blazer seen leaving the fire scene. The court found that while the police did enter the vehicle when it was parked in front of petitioner's home (a contention at the hearing which the prosecution denied), the obtaining of a search warrant based on independent grounds (Mr. LaFranchi's observations) and the subsequent search of the vehicle pursuant to a valid search warrant constituted the grounds for a finding of "inevitable discovery."

As this Court noted in *Nix* v. *Williams*, 104 S.Ct. 2501, 2508 (1984):

> "[T]he more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint' " citing *Won Sun* v. *United States*, 83 S.Ct. 407, 417 (1963).

Here, the trial court, cognizant of the subsequent valid search warrant based upon evidence untainted of the "primary illegality", properly noted that "it was inevitable as may be imagined that the lawful search of the blazer would have followed." *United States* v. *Fishner*, 700 F.2d 780, 784 (C.A. 2nd Cir. 1983); *People* v. *Payton*, 45 N.Y.2d

300, 313 (1978) rev'd on other grounds, 445 U.S. 573, on remand 51 N.Y.2d 169 (1980); *People* v. *Buffardi*, 92 A.D.2d 899, 901 (2nd Dep't 1983).

Thus, this issue having already been addressed by this Court, does not present a question of substantial importance warranting review.

Conclusion

The petition for Certiorari should be denied.

Dated: Riverhead, N.Y.
November 27, 1984.

Respectfully submitted,

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